No. 1804.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The Southern Pacific Company, a corporation, et al.,
Appellants and Defendants,
vs.
The Arlington Heights Fruit Company, et al.,
Appellees and Complainants.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

STATEMENT.

1. The complainants being growers, shippers and packers of lemons and other citrus fruits, filed their bill in equity in the Circuit Court of the United States, Southern District of California, against the defendants, being common carriers engaged in interstate commerce, to enjoin the defendants from putting into effect a proposed tariff, advancing the rates upon lemons carried from points in California to points generally in the east, and

which advance is alleged to be confiscatory of the plaintiff's interests and effectuated by an illegal combination of competing carriers. [Record 5-39.]

2. The complainants are all residents and citizens of the Southern Judicial District of California, and the defendants are residents and citizens of other states, each and all doing business within the Southern District of California, Southern Division, and found in that district.

3. The bill [Record 5-39] shows that the plaintiffs are shippers of citrus fruit, including lemons, from Southern California to points throughout the United States east of the Rocky mountains.

4. That the defendants are common carriers of interstate commerce, having the power to fix rates over their own lines and connecting lines to such eastern points and places of destination. [R. 11.]

5. That the tariff rate upon lemons of $1.00 per hundred pounds in carloads applicable from Southern California to all such eastern points has been in effect for the past five years, under which the lemon industry has been established and has developed. [R. 21, 22.]

6. That the defendants being parallel and competing railroads, have combined together in violation of the Anti-Trust Act and Interstate Commerce Act, to unreasonably advance the rate upon lemons. [R. 32-33.]

7. That the defendants, in pursuance of such combination, have filed with the Interstate Commerce Commission, to be effective November 16th, 1909, and December 6th, 1909, two general tariffs upon lemons, in pursuance of such combination, and thereby propose to advance rates on lemons from $1.00 to $1.15 per hun-

dred pounds in carload lots, which charge is unjust, unreasonable and confiscatory. [R. 33.]

8. The bill further shows that by reason of the high cost in California of labor, irrigation, lands adapted to lemons, and freight to eastern markets, California lemon growers have been unable to compete with the growers of lemons in Italy and Sicily, and that by the Dingley Tariff Act of July 24, 1897, the duty on oranges and lemons was made one cent per pound. That notwithstanding this duty the California lemon growers were still unable to compete with Italy and Sicily in the eastern markets. That the actual cost of producing lemons in California, f. o. b., exceeded $1.~~00~~ 75 per hundred pounds. which quantity of lemons were produced in Italy and Sicily for twenty-five cents, and that the freight on California lemons was $1.00 a hundred pounds, and that the freight on lemons from Italy and Sicily, being mostly by water, was only about 25c for a like quantity. [Record 19-26.]

9. Thereupon, in order to protect and develop the lemon industry in the United States, Congress by the act of August 5, 1909, increased the duty on lemons to one and a half cents per pound, and that the defendant railroads thereupon saw an opportunity to appropriate to themselves a large portion of said increased tariff rate, and thereupon attempted to advance the railroad rates upon lemons. [Record 26-27.]

10. That irreparable injury will result to complainants if this tariff becomes effective, for the reason that there is no adequate remedy at law or before the commission to obtain injunctional relief or any other adequate re-

dress, and unless the complainants are granted relief in this court they will be driven out of business and their property will be confiscated. [Record 27-28.]

11. In a proceeding before the Interstate Commerce Commission, decided February 11, 1905, brought by the citrus fruit growers in California against the defendants Southern Pacific Company and the Atchison, Topeka and Santa Fe Railway Company, involving the reasonableness of the rates upon oranges and lemons between points in California and all points east of the Rocky mountains, the commission found and decided that the rate of $1.00 per hundred pounds in carload lots was not an unreasonable rate, and in that case the commission found as follows:

12. "The rate of $1.00 per hundred pounds now applied to lemons during most of the shipping season is apparently reasonable, and we see no occasion to disturb the present charge on that commodity."

10 I. C. C. R. 590, 606, 616.

13. The bill shows that the rates complained of are unreasonable, excessive and confiscatory and will operate to deprive plaintiffs of their property without due process of law, in violation of the federal constitution. [Record 33.]

14. The verified bill of complaint was used upon the application for injunction supported by numerous other affidavits. [Record 161 to 180 and 242-243.]

15. The Circuit Court found the facts and equities in favor of complainants and granted a writ of injunction pending a hearing before the Interstate Commerce Commission as to the reasonableness of the rates. [Record opinion 305-311.]

16. The defendants then appealed to the Circuit Court of Appeals.

POINTS AND AUTHORITIES.

FIRST POINT.

DEFENDANTS HAVE WAIVED THEIR RIGHT TO OBJECT TO JURISDICTION OVER THE PERSON BY JOINING IN THEIR PLEAS TO JURISDICTION OF THE PERSON, PLEAS TO THE JURISDICTION IN EQUITY AND PLEAS FOR WANT OF NECESSARY PARTIES DEFENDANT.

The principle which we invoke is that where the court has no jurisdiction over the person of the defendant and the defendant desires to insist upon his privilege, he must not only raise the objection at the first opportunity presented, but that he cannot, in invoking a decision of the court upon the question of such personal privilege, invoke a judgment of the court upon the merits of the controversy or upon any other question.

The obvious reason for the rule is that a party cannot be permitted to take inconsistent positions.

The very first question which the court is bound to consider is whether the court has jurisdiction of the person of the defendant, and, if no such jurisdiction exists, the court can go no further with the case and cannot properly decide any other question.

When, therefore, the defendant invokes a decision of the court upon the equities of the case, or upon any other question, he necessarily waives his personal privilege by demanding a ruling from the court upon such other question, and thereby assuming jurisdiction of the person.

In Fitzgerald v. Fitzgerald, 137 U. S. 98, 106, the

court directly held that an objection to jurisdiction over the person to be availing must not be raised in connection with denial of jurisdiction over the subject-matter, and that where objection to the jurisdiction over the person was joined with objections to jurisdiction over the subject-matter, it resulted in a waiver and conferred jurisdiction upon the Circuit Court to proceed.

In St. Louis etc. Railway v. McBride, 141 U. S. 127, 128, the court said:

"The defendant filed a demurrer on three grounds: 1st, because the court has no jurisdiction of the person of the defendant; 2nd, because the court has no jurisdiction of the subject-matter of the action; 3rd, because the complaint does not state facts sufficient to constitute a cause of action."

And the court held that this was a waiver of the right to object to the jurisdiction over the person of the defendant.

In Western Loan Co. v. Butte etc. Mining Co., 210 U. S. 368, 370, the defendant joined with a demurrer that the court had no jurisdiction of the person of the defendant, the additional grounds that the court had no jurisdiction of the subject-matter of the action, and that the complaint did not state facts sufficient to constitute a cause of action, and the court said:

"We are of opinion that the defendant waived objection to jurisdiction over its person and by filing the demurrer on the grounds stated submitted to the jurisdiction of the Circuit Court."

In Baltimore etc. Railway Company v. Doty, 133 Fed. 866, 869, the Circuit Court of Appeals for the Sixth

Circuit held that where the defendant demurred upon the ground:

"1st, that the said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant herein; 2nd, the said petition does not show that this court has jurisdiction over the parties herein or the cause of action set forth in said petition," that this was a waiver.

In Mahr v. Union Pacific Railroad Company, 140 Fed. 921, 923, the court said:

"Whenever a litigant appears, to deny jurisdiction over his person which would otherwise exist but for the failure to pursue the methods prescribed by law for bringing him into court, he must confine himself to that particular branch of jurisdiction. It is a matter of indifference to him whether or not the court has jurisdiction over the subject-matter, so long as it has no jurisdiction it cannot in any way injuriously affect his interests. He must therefore be content to stop with the suggestion that the summons or notice, as the case may be, required by the law to be served, has not been served, and that the court is therefore not entitled to deal with him in the absence of such service. As to whether the court has jurisdiction over the matters embodied in the complaint, he need give himself no concern. If he does, in a transitory action, and enters upon a discussion of that question or makes a challenge as to that point, he waives the want of service and enters voluntarily into a controversy which goes to the merits and thereby submits to the jurisdiction of the court over his person."

In Peale v. Marian Coal Company, 172 Fed. 639, 640, the court held that the right to object to the jurisdiction over the person was waived by filing a demurrer upon that ground, joined with a further ground that the plaintiff was not entitled to the relief prayed for.

The defendants in the present case filed pleas on different grounds. [Record 59, 64, 68.]

The plea of the Santa Fe Railway Company [Record 59], which is similar to the pleas of the Southern Pacific Company and San Pedro, Los Angeles & Salt Lake Railway Company, states as its first ground or plea in substance that the defendant is not a resident, inhabitant, or citizen of the Southern District of California.

The second plea is that the Circuit Court has no jurisdiction to determine the reasonableness or unreasonableness of the rates complained of, and that such jurisdiction is vested exclusively in the Interstate Commerce Commission.

The third plea is that the rates complained of are joint rates established by the initial lines before the court and their connecting carriers, not before the court, and that the court has no jurisdiction to make an order or decree in the absence of said indispensable parties.

The first ground goes to the personal privilege of the defendants to object to the jurisdiction of the Circuit Court for the Southern District of California, by reason of the non-residence of these defendants.

> Macon Grocery Co. v. Atlantic etc. R. Co., decided by U. S. Supreme Court January 17, 1910.

But the second ground goes to the jurisdiction of the court as a court of equity, and is based upon the contention that there is an adequate remedy provided by law in another tribunal, to-wit, the Interstate Commerce Commission.

The third ground, as appears more particularly from

the assignment of errors in this court [No. 3, Record 327], goes to the equity of the case, and the contention is in effect that it would be *erroneous* for the court to grant relief to the complainants as against these defendants.

If the plea were sustained upon the first ground—jurisdiction of the parties—the judgment would be a dismissal for want of jurisdiction without any judgment for costs or award of damages.

Citizens' Bank v. Cannon, 164 U. S. 319, 323.

The jurisdiction of this court as a Circuit Court of the United States extends to the present cause and over the parties and comes within the provisions of section 1 of the Judiciary Act of March 3, 1887, as amended in 1888.

(a) The parties are citizens of different states.

(b) The case arises under the constitution and laws of the United States and involves their application.

(c) The amount in controversy exceeds the sum and value of $2,000 exclusive of interest and costs.

It cannot be doubted, therefore, that the cause is one within the general jurisdiction of the Circuit Court, whatever may be said as to the equities by reason of certain powers being conferred upon the Interstate Commerce Commission, and whatever may be said as to the necessity of other parties being before the court.

Louisville Trust Co. v. Knott, 191 U. S. 225.

Those other parties are not objecting to the jurisdiction, and it appears from the bill admitted by the plea that such absent parties are sufficiently represented by the parties before the court. It further appears that a

decree can be entered against the present defendants without bringing in such other parties. The plea plainly goes only to the jurisdiction in equity and to the want of equity.

If the plea were sustained on the second ground—want of equity jurisdiction—the judgment would be an order of dismissal of the bill without prejudice to a new action, and it would carry a judgment for costs and damages.

Rogers v. Durant, 106 U. S. 644, 646;
Lacassagne v. Chapuis, 144 U. S. 119, 126;
Rule 35 in Equity.

If the third ground of the plea were sustained as to want of necessary parties and which goes to the equities, judgment should be an order for dismissal of the bill but which would carry a judgment for costs and damages against complainants. Unless the defendants are before the court and unless the court has jurisdiction over their persons the defendants would have no right to invoke the judgment of the court upon either the second or third grounds stated in the plea, and unless the court had such jurisdiction over the defendants it would have no right to enter upon a consideration of those grounds nor enter a judgment for costs or damages upon the injunction bond against the complainants.

THE PLEA PRESENTS AND REQUIRES A DECISION OF THE EQUITY POWERS OF THE CIRCUIT COURT OF THE UNITED STATES.

2nd. The second and third grounds of the plea demand and require a consideration and decision from the court as to the entire scope of the equity powers of the

courts of the United States (see appellants' brief, p. 27), involving a construction not only of the laws of Congress, but of the constitution of the United States, and particularly of the fifth amendment to the constitution. which prohibits the United States from depriving any person of property without due process of law.

The bill not only seeks to prevent the defendants from carrying into effect an interstate rate, upon the ground that it is *per se* unreasonable and unjust. but the bill distinctly charges a combination and conspiracy between the defendants, they being competing lines, to destroy competition and to exact excessive and confiscatory charges for interstate transportation, in violation of the Interstate Commerce Act and the Anti-Trust Act of July 2, 1890, thereby depriving the complainants of their property without due process of law, in violation of the constitution of the United States and amendments thereto. [Record 32-33.]

The fifth amendment to the federal constitution prohibits the United States, directly or through its agencies, from depriving any person of property without due process of law, and from taking private property for public use without just compensation.

The bill shows that the defendants have filed the proposed tariff of rates in pursuance of a claimed authority granted by the Interstate Commerce Act, and are seeking to establish such rates as a public agency of the United States. The Interstate Commerce Commission has no power to enjoin these rates or to do otherwise than proceed to hear and determine a case upon the merits as to their reasonableness, which may take from one to five

years, but the constitution does not allow the property of one person to be taken by another at all, neither for a month nor for a year, without compensation. Moreover, the bill shows that the question is not one of rates alone, but that the property and groves of the complainants will be deteriorated in value if not wholly destroyed by such confiscatory rates.

In all the cases brought by the railroads to prevent enforcement of unjust rates as involving a taking of property without due process of law the question has not been whether the plaintiffs might not, by one or more actions of law, have recovered damages, but the court has stopped such spoilation in its inception, and has not allowed the property to be taken at all.

Chicago Railroad v. Minnesota, 134 U. S. 418, 458;

Reagan v .Farmers' Loan & Trust Co., 154 U. S. 362, 399;

Smythe v. Ames, 169 U. S. 466, 524, 525;

Ex Parte Young, 209 U. S. 123;

Prentis v. Atlantic Coast Line, 211 U. S. 230.

Injunctive relief in the present case avoids long delays before the Commerce Commission. which acts only legislatively, and not judicially, and whose judgment in the end would not be final or conclusive; it prevents multiplicity of actions, and prevents the destruction of plaintiffs' property and vested rights.

The fixing of rates, whether by the railroad or by the commission, is a *legislative* and not a judicial act. The

bill charges that the rates fixed are confiscatory and this gives ground for injunctional relief.

Prentis v. Atlantic Coast Line, 211 U. S. 210, 226;
Ex Parte Young, 209 U. S. 142, 147;
Covington v. Sandford, 164 U. S. 578, 596.

The plea, therefore, raises directly the constitutional question as to the power of these defendants to establish and put into effect this confiscatory tariff in the face of the provisions of the fifth amendment, and raises also the validity of the tariff as in violation of the Sherman Act and Interstate Commerce Act.

Irrespective, therefore, of the reasonableness of the rates *per se* there are involved in the plea questions beyond the power of the Interstate Commerce Commission to hear or determine, but within the jurisdiction of the Circuit Court, as defined by the Judiciary Act of 1887-8, and the defendants have invoked a decision of the court upon these questions, and have thereby waived objection to jurisdiction over the person.

The objections to the right and power of the Circuit Court to hear and determine this case raised by the plea (for want of parties and because cognizable before the commission) do not go to the *jurisdiction* of the Circuit Court as a Circuit Court of the United States.

The question is not one of *jurisdiction*, but of *equity*.

Smith v. McKay, 161 U. S. 355, 357;
Louisville Tr. Co. v. Knott, 191 U. S. 225, 232.

3rd. Defendants Southern Pacific Company and San Pedro, Los Angeles and Salt Lake Railroad Company,

after having filed their so-called pleas to the jurisdiction involving the equity powers of this court which were overruled [R. 248], then filed their separate demurrers to the bill on numerous alleged grounds of want of jurisdiction [R. 73, 78] and also upon the ground that

"Said complainants have not in and by their said bill stated such a case as does or ought to entitle them or either of them to any such relief as thereby sought and prayed for from or against this defendant." [R. 77, 82.]

These two defendants did not file these general demurrers under protest, or in anywise save or reserve the objections to jurisdiction urged in the pleas to the jurisdiction.

These general demurrers were filed voluntarily after the pleas to the jurisdiction had been overruled, and it would seem from the language of the Supreme Court in Macon Grocery Company v. Atlantic Coast Line Railway Company, cited in appellants' brief (p. 14), that if these defendants still insisted upon objections to the jurisdiction, that such objections should have been insisted upon and saved in the demurrers and answers going to the merits, and if not, they were waived.

SECOND POINT.

This Court Has Jurisdiction of Defendant Transcontinental Freight Bureau, it Being an Association of Numerous Corporations Represented by the Three Railroad Companies Doing Business in This District.

Equity Rule 48 provides as follows:

"Where the parties on either side are very numerous, and cannot without manifest inconvenience and oppress-

ive delays, in the suit to be brought before it, the court in its discretion may dispense with making all of them parties and may proceed in the suit having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it, but in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties."

Story's Equity Pleading, Secs. 95, 97, 118, 123;

Davis v. Gray, 16 Wall. 232, 233.

See also

Equity Rule 47.

THIRD POINT.

THE COURT HAS JURISDICTION OF DEFENDANT INITIAL LINES, EVEN IF IT HAS NO JURISDICTION OVER THE CONNECTING CARRIERS.

This was expressly decided by the Circuit Court of Appeals and Supreme Court in Texas Pacific Railway v. Interstate Commerce Commission, 162 U. S. 199, 202, 203, and was in effect decided by passing upon the merits in a similar case where the question was raised and argued, in Southern Pacific Company v. Interstate Commerce Commission ("Orange Case"), 200 U. S. 536.

The bill seeks to enjoin defendants before the court from committing an irreparable injury to the complainants, and the defendants before the court in effect claim that the threatened injury was a matter of contract between those defendants and others.

The reason for the rule is that a *joint tort feasor* or any wrongdoer cannot shield himself from injunction or

other prosecution by claiming that the tort is committed under a contract with other parties not before the court.

Cooley on Torts, 2nd Ed., p. 153;

Interstate Commerce Commission v. Texas Pacific Railroad, 52 Fed. 188, 162 U. S. 199, 202, 203;

Haws on Parties to Actions, Sec. 28a;

15 Enc. P. & P., p. 557;

Wilkinson v. Parry, 4 Russell (Eng. Ch.) 272, 274;

People's Telephone Co. v. East Tennessee etc. Co., 103 Fed. 212 (C. C. A. 6th Circuit);

St. Louis Ry. v. Coolridge, 83 S. W. 333 (Ga.);

Story's Eq. Pl., Secs. 95, 97, 118.

The bill of complaint in this case did not ask the court, as suggested by appellants' counsel, to compel the Southern Pacific, the Santa Fe and the Salt Lake Railroad companies to make a new tariff of rates with their eastern connections, nor did it ask that any tariff of rates, joint or otherwise, should be made.

The facts were that there was on file with the Interstate Commerce Commission a legal and valid tariff of rates at $1 a hundred pounds, executed by the initial lines with their connecting lines, and it was proposed by defendants to annul this tariff and advance the rates on lemons by a new joint tariff. This new joint tariff could not take effect or become operative without the acquiescence and approval of all of the parties to such joint tariff.

The Circuit Court, as a court of equity having jurisdiction of the initial lines, stepped in and forbade the

western lines from carrying into effect an arrangement prohibited by law by which they proposed to take the property and money of the plaintiffs without compensation and without due process of law.

The court has stayed the hands of some of the wrongdoers and thereby prevented them from reaching any advantage from their contemplated illegal act, which could only be effected by the joint act of all.

FOURTH POINT.

THIS COURT AS A COURT OF EQUITY HAS JURISDICTION TO GRANT INJUNCTIONAL RELIEF TO PREVENT UNLAWFUL ADVANCES IN THE SCHEDULES OF TARIFFS OF RATES UPON LEMONS IN AID OF A PROCEEDING BEFORE THE INTERSTATE COMMERCE COMMISSION TO READJUST AND ESTABLISH A REASONABLE RATE.

In Chicago Railroad v. Union Pacific Railway, 47 Fed.. at page 26, Justice Brewer said:

"I believe most thoroughly that the powers of a court of equity are as vast and its processes and procedure as elastic as all the changing emergencies of increasingly complex business relations and the protection of rights can demand. * * *

"They are potent to protect the humblest individual from the oppression of the mightiest corporation; to protect every corporation from the destroying greed of the public; to stop state or nation from spoilating or destroying private rights; to grasp with strong hand every corporation, and compel it to perform its contracts of every nature and do justice to every individual."

The United States circuit courts as courts of equity will enjoin a threatened act, which will result in the taking under governmental authority, by any agency, of

complainants' property without due process of law, which is the equivalent of taking without just compensation, whether such taking be in violation of the fourteenth amendment or the fifth amendment to the United States constitution.

As to the fourteenth amendment:

Chicago Railroad v. Minnesota, 134 U. S. 418, 458;

Reagan v. Farmers' Loan and Trust Co., 154 U. S. 362, 399;

Smythe v. Ames, 169 U. S. 466, 524, 525;

Ex Parte Young, 209 U. S. 123;

Prentis v. Atlantic Coast Line, 211 U. S. 210, 230.

As to the fifth amendment:

United States v. Great Falls Co., 112 U. S. 645;

Monongahela Co. v. United States, 148 U. S. 312, 336;

United States v. Lynah, 188 U. S. 445, 471.

Irreparable Injury.

Equity will enjoin a threatened irreparable injury in violation of the Interstate Commerce Act in suits brought by individuals where individual damage is shown:

Union Pacific Railroad v. Hall, 91 U. S. 343, 355;

In Re Lennon, 166 U. S. 548, 553 and 554;

Union Pacific Railroad v. Mason City Co., 199 U. S. 160, 165;

Donovan v. Pennsylvania Railroad, 199 U. S. 279, 292;

Toledo Railroad v. Pennsylvania Railroad, 54 Fed. 730, 746;
Thomas v. Cincinnati Railroad, 62 Fed. 803;
Story's Equity Jur., Secs. 921, 923, 924;
Pomeroy's Equity Jur., Sec. 1349;
High on Injunctions, Secs. 745, 1554;
2 Daniell's Chancery P. & P., 4th Ed., p. 1636.

Injunction to Restrain an Increase of Freight Rates.

Injunctions have been issued to restrain an increase of freight rates in the following cases:

Tift v. Southern Railway Company, 123 Fed. 789 (U. S. C. C. Ga., July 16, 1903, Judge Speer); 138 Fed. 753 (June 28, 1905), 206 U. S. 428. (Lumber rates.)

Jewett Bros. & Jewett v. C. M. & St. P. Ry., 156 Fed. 160 (U. S. C. C., S. Dak., Sept. 27, 1907, Judge Carland.) (General merchandise rates.)

Fairmont Creamery Co. v. I. C. R. R. Co. (U. S. C. C., Ill., Judge Kohlsaat, Oct. 14, 1907.) See, with reference to this injunction, Mchts. Traffic Ass'n. v. Pacific Express Co., 13 I. C. C. 131, 132; Annual Report Interstate Commerce Commission 1907, p. 10; 1st Annual Report Oregon R. R. Com'n., 1906, p. 73; Fairmont Creamery Co. v. I. C. R. R. Co., 15 I. C. C. 109 (Jan. 3, 1909). (Restraining advance in cream rates.) Not reported.

Metropolitan Paving Brick Co. v. Pennsylvania Co. (U. S. C. C., W. D. Penn., Judge Arch-

bold, Aug., 1907.) (Restraining advance in rates on paving brick.) Not reported.

Beatrice Creamery Co. v. Mich. Cent. R. R. (U. S. C. C., Ill., Gen. No. 29,042, Judge Kohlsaat, April 14, 1908.) Not reported. (Restraining advance in rates on cream.) See Fairmont Creamery Co. v. I. C. R. R. Co., 15 I. C. C. 109 (June 6th, 1909).

Oregon & Washington Lumber Mfgs. Ass'n. v. U. P. R. R. Co. (U. S. C. C., Oregon and Washington, Judges Hanford and Wolverton, Oct. 31, 1907). (Restraining advance in lumber rate.) For opinion of Judge Hanford see note, 165 Fed. 12. (Affirmed 165 Fed. 1, 13, 25.)

Kalispell Lumber Co. v. Gt. N. Ry. Co., 157 Fed. 845 (U. S. C. C., Montana, Dec. 4th, 1907). Judge Hunt reversed 165 Fed. 25 because the rates had gone into effect prior to the order. These cases, except the last, were affirmed by the Circuit Court of Appeals for the Ninth Circuit in N. P. Ry. Co. v. Pac. Coast Lumber Mfgs. Ass'n., 165 Fed. 1, C. C. A. . . (9th C. C. A., Oct. 5th, 1908). Judges Gilbert, Roos and Morrow, U. P. Ry. Co. v. Oregon and Washington Lumber Mfgs. Ass'n., 165 Fed. 13, . . C. C. A. . . (9th C. C. A., Oct. 5th, 1908), Judges Gilbert and Morrow concurring, Judge Ross dissenting (165 Fed. 13); Gt. N. Ry. Co. v. Kalispell Lumber Co., 165 Fed. 25, . . C. C. A. . . (9th Cir. A., Oct. 5th, 1908), Judges Gilbert, Ross and Morrow.

M. C. Kiser v. Central of Georgia Ry. Co., 158 Fed. 193 (U. S. C. C., Ga., Dec. 21st, 1907, Judge Newman).

Macon Grocery Co. v. Atlantic Coast Line, 163 Fed. 736, 163 Fed. 738 (U. S. C. C., Aug. 1st, 1908, Judge Speer); reversed 166 Fed. 206 (C. C. A.)

At San Francisco, in November, 1908, an injunction was obtained restraining *Wells, Fargo & Co.* from increasing certain express rates. Not reported.

At Detroit, on Feb. 24th, 1909, U. S. District Judge Swan issued a restraining order on the petition of Wabash Portland Cement Co. against the Mich. Cent. R. Co., Pere Marquette, D. G. H. I. M. and D. & M. R. Co., restraining advance in cement rates. Not reported.

FIFTH POINT.

Appellants' brief (p. 26) cites and relies upon the recent case of Baltimore and Ohio Railroad Company v. United States of America *ex rel.* Pitcairn Coal Company, decided by the United States Supreme Court, January 10, 1910, as being an authority holding that the United States circuit courts as courts of equity do not have jurisdiction over the subject-matter of a suit like the present case, brought to enjoin an irreparable injury to the defendants' property and rights by means of a confiscatory tariff of rates, illegally made by competitive lines and illegally filed.

The Baltimore and Ohio case above cited seems to have been a case in mandamus brought on relation of the Pitcairn Coal Company to compel the Baltimore and Ohio Railroad to furnish certain cars to the relator, and seems to be distinguished from the present case in many respects, including the following:

(1) It was an action in mandamus and a law action.

(2) It did not involve any question of rates, nor any tariff of rates.

(3) It did not involve nor present a case of confiscatory action exercised by carriers of interstate commerce under an authority of the United States.

(4) It did not present any constitutional question as to taking of the property of the relators without due process of law and without compensation.

(5) It was not a suit in equity brought in aid of a proceeding before the Interstate Commerce Commission to prevent an irreparable injury which could not be prevented by the commission pending a final determination before the commission.

In other words, it was a case in mandamus to prevent an alleged discrimination against the relators for which the court held there was a plain and adequate remedy before the commission.

CONCLUSION.

Counsel for appellants request that certain questions of jurisdiction should be certified by this Honorable Court to the Supreme Court. We presume that under the provisions of section 6 of the Circuit Court of Ap-

peals Act, approved March 3, 1891, the court may after final decision certify to the Supreme Court questions involving the jurisdiction of this court and of the Circuit Court, but if such questions are to be certified, we ask that the questions presented to the Supreme Court be those that are made by the bill of complaint in this case, and not any moot questions, such as we think are suggested by appellants' counsel.

We do not desire to be understood as objecting to questions being certified, which will show in brief language the scope of the bill and the question of the jurisdiction of the United States Circuit Court as a court of equity to grant any relief under the circumstances alleged.

Respectfully submitted.

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